EDITOR'S NOTE

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89- 1431

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

MORRIS B. MYERS, PETITIONER,

VERSUS

STATE OF SOUTH DAKOTA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

MORRIS B. MYERS, PETITIONER PRO SE
295 EAST SECOND AVENUE
MIDVALE, UTAH 84047
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I

QUESTION PRESENTED FOR REVIEW

WHETHER PETITIONER'S EMBEZZLEMENT CONVICTION AND PUNISHMENT, AND REVOCATION OF PETITIONER'S PROFESSIONAL LICENSE, FOR BORROWING MONEY FROM A BANK AND SPENDING IT, ACTS THAT THE LAW DOES NOT MAKE CRIMINAL, VIOLATES PETITIONER'S DUE PROCESS RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES.

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OCTOBER TERM 1989

MORRIS B. MYERS,

PETITIONER

VERSUS

STATE OF SOUTH DAKOTA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
SOUTH DAKOTA

MORRIS B. MYERS, PETITIONER, RESPECTFULLY PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE ORDER DENYING MOTION OF THE SUPREME COURT OF SOUTH DAKOTA DATED SEPTEMBER 11, 1989, NO. 11304 (STATE OF SOUTH DAKOTA, PLAINTIFF AND APPELLEE, VS. MORRIS B. MYERS, DEFENDANT AND APPELLANT), AND NO. 11057 IN THE MATTER OF THE DISCIPLINE OF MORRIS BEECHER MYERS, A/K/A MORRIS MYERS, AS AN ATTORNEY AT LAW.

OPINIONS BELOW

THE SOUTH DAKOTA SUPREME COURT DECISION AFFIRMING THE LOWER COURT CONVICTION FOR EMBEZZLEMENT IS REPORTED AT 220 N.W.2D 535 AND IS REPRINTED AS APPENDIX A.

THE SOUTH DAKOTA SUPREME COURT ORDER REVOKING LICENSE TO PRACTICE LAW IS REPRINTED AS APPENDIX B.

THE CHALLENGED ORDER DENYING MOTION IS REPRINTED AS APPENDIX C.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMEND. V,

> NO PERSON SHALL BE . . . DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW; . . .

STATEMENT OF JURISDICTION

PETITIONER'S CONVICTION FOR EMBEZZLEMENT WAS AFFIRMED BY THE SOUTH DAKOTA SUPREME COURT ON AUGUST 2, 1974. THE PUBLISHED DECISION WAS CHALLENGED BY PETITIONER BY MOTION IN THE SOUTH

DAKOTA SUPREME COURT TO VACATE THE DECISION AND THE ORDER REVOKING PETITIONER'S LICENSE TO PRACTICE LAW AS WELL, ON CONSTITUTIONAL DUE PROCESS GROUNDS THAT THE DECISION IS ON ITS FACE UNCONSTITUTIONAL. PETITIONER'S MOTION TO VACATE WAS DENIED ON SEPTEMBER 11, 1989.

STATUTORY PROVISION BELIEVED TO CONFER ON THE UNITED STATES SUPREME COURT JURISDICTION TO REVIEW THE ORDER DENYING MOTION BY WRIT OF CERTIORARI: 28 USC § 1257(A).

STATEMENT OF THE CASE

IN THE EARLY 1970S PETITIONER WAS A PRACTICING LAWYER IN ABERDEEN, SOUTH DAKOTA. HE WAS PROSECUTED FOR EMBEZZLEMENT UNDER A SECTION OF THE SOUTH DAKOTA CRIMINAL CODE (SDCL 22-28-2) WHICH PROVIDED,

> [I]F ANY PERSON BEING A[N] . . . ATTORNEY, . . . OR BEING OTHERWISE ENTRUSTED WITH OR HAVING IN HIS CONTROL PROPERTY FOR THE USE

> OF ANY OTHER PERSON OR FOR ANY PUBLIC OR BENEVOLENT PURPOSE, FRAUDULENTLY APPROPRIATES IT TO ANY USE OR PURPOSE NOT IN THE DUE AND LAWFUL EXECUTION OF HIS TRUST, OR SECRETES IT WITH THE FRAUDULENT INTENT TO APPROPRIATE IT TO SUCH USE OR PURPOSE, HE IS GUILTY OF EMBEZZLEMENT.

IN PERTINENT PART, THE INDICTMENT READ AS FOLLOWS,

> [T]HAT MORRIS B. MYERS, ON OR ABOUT THE 9TH DAY OF JANUARY, 1970, WHILE BEING AN ATTORNEY DULY LICENSED TO PRACTICE LAW IN SOUTH DAKOTA, HAD UNDER HIS CONTROL CERTAIN PROPERTY FOR THE USE OF ANOTHER PERSON, TO-WIT: CASH IN EXCESS OF $50.00, SAID PROPERTY BEING ENTRUSTED TO HIM BY JEANETTE ZICK, AND HE DID THEN AND THERE FRAUDULENTLY APPROPRIATE SAID PROPERTY TO A USE OR PURPOSE NOT IN THE DUE AND LAWFUL EXECUTION OF HIS TRUST CONTRARY TO THE FORM OF THE STATUTE IN SUCH CASES MADE AND PROVIDED AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF SOUTH DAKOTA.

DISCIPLINARY PROCEEDINGS WERE INSTITUTED BASED ON THE SAME COMPLAINT. THE EVIDENCE PRESENTED TO THE REFEREE IN THE

DISCIPLINARY PROCEEDINGS WAS THE SAME AS IN THE EMBEZZLEMENT PROSECUTION. IN NEITHER PROCEEDING WAS THE RELEVANT EVI- EVIDENCE DISPUTED.

A JURY CONVICTED PETITIONER ON THE EMBEZZLEMENT CHARGE AND THEREAFTER ON MAY 12, 1973, THE SUPREME COURT OF SOUTH DAKOTA ENTERED AN ORDER REVOKING PETITIONER'S LICENSE TO PRACTICE LAW.

THE CONVICTION WAS APPEALED TO THE SOUTH DAKOTA SUPREME COURT AND WAS AFF- IRMED. THE OPINION OF THE COURT IS RE- PORTED AT 535 N.W.2D 535.

THE SUMMARY OF THE EVIDENCE IN THE DECISION PARALLELS THE FINDINGS OF THE REFEREE IN THE DISCIPLINARY PROCEEDINGS.

IN JULY, 1989, PETITIONER FILED HIS MOTION WITH THE SOUTH DAKOTA SUPREME COURT TO HAVE THE REPORTED DECISION VA- CATED AND WITHDRAWN AND TO HAVE THE RE- MITTITUR RECALLED AND REISSUED WITH DIR-

ECTION TO DISMISS THE PROSECUTION, AND TO VACATE AND WITHDRAW THE MAY 18, 1973 ORDER REVOKING PETITIONER'S PROFESSIONAL LICENSE, ON DUE PROCESS GROUNDS.

THE PETITIONER'S MOTION IN THE SOUTH DAKOTA SUPREME COURT:

> "THE RELEVANT EVIDENCE IS NOT DISPUTED. TAKEN FROM THE SUMMARY OF THE COURT AT 220 N.W.2D 535, 537, **[MYERS] ON THE STRENGTH OF THE [SERIES E] BONDS [REGISTERED IN THE NAMES OF HERMAN WEISMANTEL, P.O.D. MRS. JEANETTE ZICK] AND HIS PERSONAL NOTE BORROWED FROM THE BANK THE AMOUNT OF THE REDEMPTION VALUE IN THE SUM OF $4,035.60 WHICH HE DEPOSITED IN HIS OWN PERSONAL ACCOUNT. [MYERS] GAVE HIS PERSONAL NOTE TO THE BANK.**
> THE KEY WORD IN THE JUST QUOTED SUMMARIZATION IS 'BORROWED.' THIS CHARACTERIZATION IS ACCURATE IN LIGHT OF STATE'S WITNESS DENNIS CHRISTENSEN'S TESTIMONY (TR 73),
>
> Q. AFTER YOU HAD DONE THIS, YOU LOANED MR. MYERS $4035.60?
> A. YES.
> Q. YOU PUT THE PROCEEDS OF THAT NOTE IN MORRIS MYERS' ACCOUNT, IS THAT CORRECT?
> A. YES.
>
> THE DATE OF THE NOTE IS JANUARY 8, 1970. MYERS ACCOUNT WAS OFFICIALLY CREDITED WITH $4035.60 ON JANUARY 9, 1970, THE DATE MENT-

IONED IN THE INDICTMENT. CONTROLLING SOUTH DAKOTA LAW AT THE TIME WAS STATUTORY, SDCL §§ 43-37-2 AND 43-37-9, AND DECISIONAL, COTTONWOOD COUNTY BANK v. CASE, 125 N.W. 298 (S.D. 1910). IT HELD THAT A BORROWER OF MONEY OWNS THE MONEY. THE ANALYSIS OF ROLIN M. PERKINS AND RONALD N. BOYCE STATED AT PAGE 361, CRIMINAL LAW, 3RD ED., 1982, APPLIES:"FOR EXAMPLE IN THE FAMILIAR PHRASE 'BORROW MONEY' THE WORD 'BORROW' IS MISUSED. THIS IS A PURCHASE OF MONEY BY THE PROMISE TO PAY FOR IT LATER, JUST AS ONE MAY PURCHASE A CHATTEL ON THE PROMISE TO PAY FOR IT LATER. THE FACT THAT THE PRICE IS FIXED IN TERMS OF PRINICPAL AND INTEREST IS UNIMPORTANT. THAT IS WHAT IT COSTS TO BUY MONEY. WHILE SPENDING MONEY IS A TYPICAL METHOD OF CONVERSION, IF IT IS THE MONEY OF ANOTHER, SPENDING MONEY BY THE SO-CALLED 'BORROWER' IS NOT CONVERSION BECAUSE HE IS SPENDING HIS OWN MONEY. * * *THE 'BORROWER' COULD NOT COMMIT EMBEZZLEMENT . . . BECAUSE IT IS HIS [MONEY]."

"ONE CANNOT EMBEZZLE ONE'S OWN PROPERTY." IN RE BELFRY, 862 F.2D 662 (8CIR.1988). "LOANING MONEY TO A BORROWER, AND PLACING FUNDS IN THE HANDS OF AN AGENT [ATTORNEY], ARE ESENTIALLY DIFFERENT TRANSACTIONS. COTTONWOOD COUNTY BANK V. CASE, 125 N.W., AT 303. IN THE CRIMINAL AS WELL AS THE DISCIPLINARY PROCEEDINGS THERE ARE NO FACTUAL MATTERS WHICH IMPACT THE QUESTION OF OWNERSHIP.

A SHOWING OF ACCIDENT OR INADVERT-

ENCE IS NECESSARY TO MOVE THE COURT TO RECALL ITS REMITTITUR. IN RE SEYDEL, 14 SD 115, 84 NW 397. ACCIDENT OR INADVERTENCE IN RENDERING THE COURT'S DECISION AROSE UNDER THE FOLLOWING FACTS AND CIRCUMSTANCES.

ON JANUARY 16, 1970, WITHOUT THE KNOWLEDGE OF DEFENDANT [MYERS], DENNIS CHRISTENSEN, FOR THE FARMERS AND MERCHANTS BANK, RECEIVED IN THE MAIL A TREASURY CHECK PAYABLE TO MRS. ZICK. ON JANUARY 16, 1970, DENNIS CHRISTENSEN, FOR THE BANK, AFFIXED A STAMPED ENDORSEMENT ON THE TREASURY CHECK PAYABLE TO MRS. ZICK, AS FOLLOWS: "CREDITED TO THE ACCOUNT OF THE WITHIN NAMED PAYEE IN ACCORDANCE WITH PAYEE'S INSTRUCTIONS. ABSENCE OF ENDORSEMENT GUARANTEED. THE FARMERS AND MERCHANTS BANK, ABERDEEN, SD.", EVEN THOUGH MRS. ZICK DID NOT HAVE AN ACCOUNT AT THE BANK.

TREASURY REGULATIONS IN FORCE AT THE TIME REQUIRED BOND REDEMPTION PAYMENTS TO BE MADE BY TREASURY CHECK DRAWN TO THE ORDER OF THE REGISTERED OWNER [31CFR315.39]. 31CFR360.8(B) PERMITTED A BANK TO USE THE ABOVE ENDORSEMENT IF THE 'CHECK IS CREDITED BY [THE] BANK TO THE PAYEE'S ACCOUNT UNDER ITS (PAYEE'S) AUTHORIZATION, AND THE ENDORSEMENT CONSTITUTES A GUARANTEE TO ALL SUBSEQUENT INDORSERS AND TO THE TREASURER THAT THE BANK IS ACTING AS ATTORNEY IN FACT FOR THE PAYEE OR PAYEES, UNDER HIS OR THEIR AUTHORIZATION. 31CFR360.5 GRANTS THE TREASURER THE RIGHT TO DEMAND REFUND FROM THE PRESENTING BANK OF THE AMOUNT OF A PAID CHECK

IF AFTER PAYMENT THE CHECK IS FOUND TO BEAR A FORGED OR UNAUTHORIZED ENDORSEMENT.

IT CANNOT BE SERIOUSLY QUESTIONED THAT MRS. ZICK'S CHECK WAS PAID ON AN UNAUTHORIZED ENDORSEMENT. THE EFFECT OF THIS IS THAT IN LAW THERE IS NOT PAYMENT OF THE CHECK, IT REMAINS UNPAID. US v. GUARANTY TRUST CO., 293 US 340, 79 LED 415, 55 SCT 221 (1934).

ALTHOUGH INCLUDED IN THE COURT'S SUMMARIZATION OF THE EVIDENCE, THE FOLLOWING IS NOT RELEVANT OR PROBATIVE IN EITHER PROCEEDING (EXCEPT TO RESTATE THAT DEFENDANT [MYERS] WAS A 'BORROWER' AND THAT THE 'PROCEEDS OF THE REDEEMED BONDS' WAS A FUTURE FACT NOT IN EXISTENCE AT THE TIME OF THE DEPOSIT IN DEFENT'S [MYERS'] ACCOUNT) BUT DOES SERVE TO POINT UP THE ACCIDENT OR INADVERTENCE THAT MUST EXIST FOR THE COURT TO RECALL ITS REMITTITUR. (COURT'S SUMMARY, CONTINUED)

DEFENDANT ASKED THE BANKER IF HE COULD BORROW THE MONEY, THEN WHEN THE PROCEEDS WERE RECEIVED TO APPLY 'THOSE AGAINST THE NOTE AND PAY IT OFF.' THIS IS WHAT WAS DONE, AND WHEN THE PROCEEDS OF THE REDEEMED BONDS WERE RETURNED TO THE BANK, THE NOTE SIGNED BY DEFENDANT WAS CANCELED AS PAID IN FULL. THE BANK ENDORSED THE CHECK FROM THE TREASURER OF THE UNITED STATES WITH A CREDIT AND GUARANTEED THE ENDORSEMENT. IT WAS NOT ENDORSED BY MRS. ZICK.

DENNIS CHRISTENSEN TESTIFIED (TR 64),

> Q. NOW I ALSO NOTICE THAT WHEN THE GOVERNMENT CHECK

WAS RETURNED, WHEN YOU RECEIVED THE CHECK, I BELIEVE ON THE 16TH, OR THE 12TH, WAS IT?
A. JANUARY 16 [1970].
Q. SOME SEVEN OR EIGHT DAYS AFTER THIS ORIGINAL CONVERSATION, YOU ENDORSED IT; ISN'T THAT CORRECT?
A. WE ENDORSED IT WITH A CREDIT TO THE ACCOUNT OF THE PAYEE AND GUARANTEED THE ENDORSEMENT--
Q. BUT MRS. ZICK DIDN'T HAVE AN ACCOUNT IN YOUR BANK, DID SHE?
A. I DON'T BELIEVE SHE DID.

APPLICABLE TREASURY REGULATIONS PROHIBITED THE DESIGNATION OF AN ATTORNEY TO RECEIVE PAYMENT ON REDEMPTION, OR THE RESTRICTION OF THE RIGHT OF THE OWNER TO RECEIVE PAYMENT. [31CFR315.5]. THE REGULATIONS PROHIBITED TRANSFER OF BONDS, PROVIDED THAT BONDS WERE PAYABLE ONLY TO THE REGISTERED OWNER, AND PROHIBITED THEIR USE AS SECURITY FOR THE PERFORMANCE OF AN OBLIGATION [31CFR315.15]. 31CFR 315.35 PROVIDED THAT PAYMENT WOULD BE MADE 'WITHOUT REGARD TO ANY NOTICE OF ADVERSE CLAIMS TO A BOND AND NO STOPPAGE OR CAVEAT AGAINST PAYMENT IN ACCORDANCE WITH THE REGISTRATION WILL BE ENTERED.'

THE STATE CLAIMED EMBEZZLEMENT AND MISAPPROPRIATION OCCURRED WHEN DEFENDANT [MYERS] SPENT THE MONEY CREDITED TO HIS ACCOUNT ON JANUARY 9, 1970. THE

BOND PROCEEDS (THE TREASURY CHECK RECEIVED BY THE BANK ON JANUARY 16, 1970), IN A NUMBER OF INSTANCES, ARE TREATED AND REFERRED TO AS DEPOSITED IN DEFENDANT'S ACCOUNT ON JANUARY 9, 1970, EVEN THOUGH NOT EVEN IN EXISTENCE AT THE TIME OF THE DEPOSIT.

FOR EXAMPLE, AT 220 NW2D, 536, THE COURT STATES: '*** THE DEFENDANT APPEALS UNDER NUMEROUS ASSIGNMENTS OF ERROR BUT IN HIS BRIEF ON APPEAL ELIMINATES ALL EXCEPT TWO QUESTIONS WHICH ARE COVERED BY THE ASSIGNMENTS AS HEREIN NUMBERED.

'THE DEFENDANT PRESENTS SUCH QUESTIONS AS FOLLOWS: ***

'DID THE COURT ERR IN REFUSING TO ALLOW THE DEFENDANT TO TESTIFY **AS TO THE REASONS WHY HE BELIEVED HE HAD THE RIGHT TO CASH THE BONDS AND PLACE THE PROCEEDS IN HIS BANK ACCOUNT?** (ASSIGNMENT OF ERROR II)'

A SECOND INSTANCE IS IN THE TRIAL JUDGE'S RULING ON DEFENDANT'S OFFER OF PROOF QUOTED AT 220 NW2D, 540. 'BY THE COURT: WELL IT SEEMS TO ME THAT IT IS A SELF SERVING STATEMENT AS TO WHAT HE [DEFENDANT] BELIEVED. THE TESTIMONY HERE IS THAT **SHE ENDORSED THE BONDS AND HE RECEIVED THE PROCEEDS WHICH WERE PUT INTO HIS CHECKING ACCOUNT.** WELL, I AM GOING TO PERMIT THE ANSWER TO THAT FIRST QUESTION, **THAT HE BELIEVED HE HAD THE RIGHT TO PUT THAT IN HIS ACCOUNT.**'

IT IS EVIDENT THAT THE TRIAL JUDGE'S PERCEPTION WAS THAT THE BONDS COULD BE CASHED BY THE REGISTERED OWNER-HOLDER AFFIXING AN ACCEPTABLE ENDORSEMENT AS IN THE MANNER OF A CHECK OR BILL OF EXCHANGE, AND DELIVERING THE BONDS TO THE BANK IN EXCHANGE FOR CASH. SUCH IS NOT AND WAS NOT THE CASE. APPLICABLE TREASURY REGULATIONS PROVIDED FOR PAYMENT TO BE MADE UPON 'PRESENTMENT AND SURRENDER OF THE BOND WITH AN APPROPRIATE REQUEST FOR PAYMENT.' 31CFR315.35. THE REQUEST FOR PAYMENT HAD TO BE EXECUTED ON THE FORM APPEARING ON THE BACK OF THE BOND ADDING 'IN THE SPACE PROVIDED THE ADDRESS TO WHICH THE CHECK ISSUED IN PAYMENT IS TO BE MAILED' AFTER WHICH THE CERTIFYING OFFICER MUST COMPLETE AND SIGN THE CERTIFICATE FOLLOWING THE REQUEST [31DFR315.38] AND THEN PRESENT AND SURRENDER THE BOND TO A FEDERERAL RESERVE BANK WHEREUPON PAYMENT WOULD BE MADE BY CHECK DRAWN TO THE ORDER OF THE REGISTERED OWNER MAILED TO THE ADDRESS GIVEN IN THE REQUEST. 31CFR315.39(A). THE FAILURE THROUGH ACCIDENT OR INADVERTENCE TO RECOGNIZE THE CRUCIAL DIFFERENCE BETWEEN THE PROCEEDS OF THE NOTE CREDITED BY THE BANK TO DEFENDANT'S PERSONAL ACCOUNT (TR 63) ON JANUARY 9, 1970, AND THE PROCEEDS OF THE BONDS RECEIVED BY THE BANK ON JANUARY 16, 1970,

IN THE FORM OF THE TREASURY CHECK THAT IS UNPAID, RESULTED IN AN ABERRATION, I.E., FOR HAVING SPENT HIS OWN MONEY, DEFENDANT WAS CONVICTED OF EMBEZZLEMENT (IN PROCEEDINGS IN WHICH THE CORPUS DELICTI OF EMBEZZLEMENT WAS NOT ESTABLISHED INDEPENDENTLY OF DEFENDANT'S STATEMENTS), AND WAS DISBARRED FROM THE PRACTICE OF LAW.

THERE WAS NO EVIDENCE AT TRIAL OF THE FRAUDULENT APPROPRIATION BY DEFENDANT OF CASH OVER $50 ENTRUSTED BY ZICK TO DEFENDANT AS AN ATTORNEY, GIVEN THE APPLICABLE GOVERNING LAW TO THE PROSECUTION'S FACTS.

A STATE CONVICTION OF A CRIME DEVOID OF EVIDENTIARY SUPPORT IS UNCONSTITUTIONAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITES STATES CONSTITUTION. JOHNSON V. LOUISIANA, 406 US 356, 92 SCT 1620, 32 LED2D 152; VACHON V. NEW HAMPSHIRE, 414 US 478, 94 SCT664, 38 LED2D 666; GARNER V. LOUISIANA, 368 US 157, 82 SCT 248, 17 LED2D 207; JACKSON V. VIRGINIA, 443 US 307, 99 SCT 278, 61 LED2D 560.

MOREOVER, THE COURT'S DECISION IS INTERNALLY INCONSISTENT. IT DESCRIBES PERMITTED ACTS (BORROWING MONEY AND DEPOSIT OF THE BORROWED FUNDS IN THE BORROWER'S ACCOUNT) IN AN ATTEMPT TO ESTABLISH PRIMA FACIE THE COMMISSION OF THE CRIME CHARGED AND ATTRIBUTES CRIMINALITY TO THOSE PERMITTED ACTS IN PURPORTING TO RECITE FACTS AND

EVIDENTIARY MATTER UPON WHICH IT AFFIRMS THE CONVICTION BELOW. IN ITS DECISION, 220 NW2D, AT 537, THE COURT STATES: "THE STATE GAVE ITS VERSION AND THE DEFENDANT GAVE HS. IT APPEARS THE JURY ACCEPTED THAT GIVEN BY THE STATE AND REJECTED THAT BY THE DEFENDANT. ***' AND THEN IN ONE COMPLETE PARAGRAPH (P. 537) SUMMARIZES THE EVIDENCE IT REFERS TO AS THE STATE'S VERSION WHICH WAS BELIEVED BY THE JURY, BUT WHICH FAILS TO 'STATE A CLAIM' FOR EMBEZZLEMENT AND SAID DECISION IS THEREFORE FACIALLY UNCONSTITUTIONAL FOR AFFIRMING A CONVICTION THAT IS WITHOUT ANY EVIDENTIARY SUPPORT. IT CANNOT BE SERIOUSLY QUESTIONED THAT THE REDEMPTION VALUE OF THE BONDS ($4035.60) HAD SOMETHING TO DO WITH THE BANK LOANING DEFENDANT $4035.60 ON JANUARY 8, 1970. IN ITS OPINION (220 NW2D, AT 537) THE COURT SAYS '[T]HE DEFENDANT **ON THE STRENGTH OF THE BONDS** AND HIS PERSONAL NOTE BORROWED FROM THE BANK THE AMOUNT OF THE REDEMPTION VALUE IN THE SUM OF $4035.60 WHICH HE DEPOSITED IN HIS PERSONAL ACCOUNT.' IF THIS MEANS THE LOAN WAS IN SOME WAY SECURED BY THE BONDS, EVEN THOUGH, AS POINTED OUT ABOVE, THE TREASURY REGULATIONS PROSCRIBE THE HYPOTHECATION OF BONDS, THE BANK WAS ON NOTICE THAT DEFENDANT DID NOT OWN THE BONDS AND MRS. ZICK DID. (TR 33) [CROSS-EXAMINATION OF DENNIS CHRISTENSEN]

Q. DID MR. MYERS EVER TELL

YOU THAT HE OWNED
THE BONDS?
A. NO, HE DIDN'T TELL
ME HE OWNED THE BONDS.

TO THE EXTENT THE BONDS SECURED DEFENDANT'S LOAN, THE SECURITY WAS VOID. THIS, HOWEVER, DOES NOT CHANGE DEFENDANT'S RELATIONSHIP TO THE BORROWED MONEY. THE COURT, IN COTTONWOOD COUNTY BANK, SUPRA, P. 303, HELD: 'BUT, WHEN THIS MONEY WAS LOANED TO CASE BY THE BANK AND PLACED TO HIS CREDIT, THE BANK CEASED TO HAVE ANY CONTROL OVER OR INTEREST OR OWNERSHIP IN IT. IT WAS CASE'S MONEY, TO DO WITH AS HE CHOSE. THE BANK HAD ABSOLUTELY PARTED WITH IT, AND ALL INTEREST IN OR CLAIM TO IT, IN EXCHANGE FOR CASE'S NOTE AND VOID SECURITY. THERE IS NOTHING IN THE RECORD TO SHOW THAT THIS MONEY HAD THE CHARACTER OF A TRUST FUND AS MONEY OF THE BANK IN CASE'S HANDS. IT WAS SIMPLY BORROWED MONEY.' IN COTTONWOOD, THE PROPERTY SECURING THE LOAN WAS SUBJECT OF A RESULTING TRUST IN FAVOR OF CASE'S CODEFENDANT- WHO HAD FURNISHED THE MONEY TO PURCHASE THE PROPERTY.

THE ORDER REVOKING LICENSE TO PRACTICE LAW OF MAY 18, 1973, WAS THEREFORE ENTERED WITHOUT FACTUAL BASE OR EVIDENCE THAT DEFENDANT MISAPPROPRIATED PROPERTY OR MONEY BELONGING TO HIS THEN CLIENT MRS. ZICK. THE ORDER THUS CONSTITUTES ARBITRARY ACTION ON THE PART OF THE COURT AND AS SUCH DEPRIVES DEFENDANT OF DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE CONSTITUT-

ION OF THE UNITED STATES (THE TOUCHSTONE OF DUE PROCESS IS PROTECTION OF THE INDIVIDUAL AGAINST ARBITRARY GOVERNMENT ACTION. WOLFF V. MCDONNELL, 418 US 539, 94 SCT 2963, 41 LED2D 935[1974].), AND IS VOID."

REASONS FOR GRANTING THE WRIT

A FAIR READING OF THE RECORD COMPELS THE CONCLUSION THE PETITIONER WAS CONVICTED AND PUNISHED, AND HIS PROFESSIONAL LICENSE REVOKED, FOR BORROWING MONEY AND SPENDING IT, ACTS THAT THE LAW DOES NOT MAKE CRIMINAL. "THERE CAN BE NO ROOM FOR DOUBT THAT SUCH CIRCUMSTANCE 'INHERENTLY RESULTS IN A COMPLETE MISCARRIAGE OF JUSTICE' AND PRESENT[S] EXCEPTIONAL CIRCUMSTANCES' THAT JUSTIFY COLLATERAL RELIEF . . ." DAVIS V. UNITED STATES, 94 S.CT. 2298, 417 U.S. 333 (1974).

CONCLUSION

FOR THE REASONS STATED, PETITIONER RESPECTFULLY PETITIONS THIS COURT TO GRANT A WRIT OF CERTIORARI TO REVIEW THE ORDER DENYING MOTION OF THE SUPREME COURT OF THE

STATE OF SOUTH DAKOTA.

RESPECTFULLY SUBMITTED,

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295 EAST SECOND AVENUE
MIDVALE, UTAH 84047
TELEPHONE 801 561 6037

APPENDIX A

SUPREME COURT OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, PLAINTIFF AND RESPONDENT,

v.

MORRIS B. MYERS, DEFENDANT AND APPELLANT.

No. 11304

ELLSWORTH E. EVANS, DAVENPORT, EVANS, HURWITZ & SMITH, SIOUX FALLS, JOSEPH M. BUTLER, BANGS, McCULLEN, BUTLER, FOY & SIMMONS, RAPID CITY, FOR DEFENDANT AND APPELLANT.

WILLIAM J. JANKLOW, ASST. ATTY. GEN., PIERRE, FOR PLAINTIFF AND RESPONDENT; KERMIT A. SANDE, ATTY. GEN., GEORGE S. MICKELSON, WILLIAM J. SRSTKA, JR., SP. ASST. ATTYS. GEN., PIERRE, ON THE BRIEF.

WINANS, JUSTICE.

DEFENDANT WAS INDICTED BY A GRAND JURY IN BROWN COUNTY, SOUTH DAKOTA ON SEPTEMBER 11, 1972. A CHANGE OF VENUE WAS GRANTED TO BROOKINGS COUNTY, SOUTH DAKOTA, WHERE THE TRIAL WAS HELD. THE INDICTMENT CONTAINED TWO SEPARATE COUNTS, THE SECOND OF WHICH WAS BY THE CIRCUIT COURT ELIMINATED FROM CONSIDERATION BY THE JURY. IT WILL NOT BE CONSIDERED FURTHER.

COUNT I IS IN THE FOLLOWING LANGUAGE:

> "THAT MORRIS B. MYERS, ON OR ABOUT THE 9TH DAY OF JANUARY, 1970, IN BROWN COUNTY, SOUTH DAKOTA, WHILE BEING AN ATTORNEY DULY LICENSED TO PRACTICE LAW IN SOUTH DAKOTA, HAD UNDER HIS CONTROL CERTAIN PROPERTY FOR THE USE OF ANOTHER PERSON, TO WIT: CASH IN EXCESS OF $50.00, SAID PROPERTY BEING ENTRUSTED TO HIM BY JEANETTE ZICK, AND HE DID THEN AND THERE FRAUDULENTLY APPROPRIATE SAID PROPERTY TO A USE OR PURPOSE NOT IN THE DUE AND LAWFUL EXECUTION OF HIS TRUST CONTRARY TO THE FORM OF THE STATUTE IN SUCH CASES MADE AND PROVIDED AND AGAINST THE PEACE AND DIGNITY OF THE STATE OF SOUTH DAKOTA."

THE JURY RETURNED A VERDICT OF GUILTY ON COUNT I AND DEFENDANT WAS GIVEN A TWO-YEAR STATE PENITENTIARY SENTENCE BY THE COURT. THE DEFENDANT APPEALS UNDER NUMEROUS ASSIGNMENTS OF ERROR, BUT IN HIS BRIEF ON APPEAL ELIMINATES ALL EXCEPT TWO QUESTIONS WHICH ARE COVERED BY THE ASSIGNMENTS AS HEREIN NUMBERED.

THE DEFENDANT PRESENTS SUCH QUESTIONS AS FOLLOWS:

"I

> "DOES THE RECORD SUPPORT THE CONVICTION OF DEFENDANT OF THE ACT AND INTENT NECESSARY TO CONSTITUTE EMBEZZLEMENT? (ASSIGNMENTS OF ERRIR I AND IV)

"II

"DID THE COURT ERR IN REFUSING TO ALLOW THE DEFENDANT TO TESTIFY AS TO THE REASONS WHY HE BELIEVED HE HAD THE RIGHT TO CASH THE BONDS AND PLACE THE PROCEEDS IN HIS BANK ACCOUNT? (ASSIGNMENT OF ERROR II)"

THE KEY WORDS IN THE FIRST QUESTION PRESENTED FOR REVIEW BY THIS COURT ARE "ACT" AND "INTENT". IS THE EVIDENCE SUFFICIENT IN THIS REGARD?

OUR REVIEW MUST BE CONSIDERED UNDER SOME WELL KNOWN PRINCIPLES HERETOFORE ANNOUNCED BY THIS COURT. IN THE CASE OF STATE v. HENRY, 1973, S.D., 210 N.W.2D 169, 171, WE HELD:

"* * * AS A REVIEWING COURT WE MUST VIEW THE EVIDENCE IN LIGHT MOST FAVORABLE TO THE STATE ON APPEAL FROM A CONVICTION. THIS COURT HELD IN STATE v. GEELAN, 1963, 80 S.D. 135, 120 N.W.2D 533, 536:

'ACCEPTING THE STATE'S EVIDENCE INDULGING THE MOST FAVORABLE INFERENCES WHICH CAN FAIRLY BE DRAWN THEREFROM, AS THE JURY HAD A RIGHT TO DO, WE HAVE NO HESITANCY IN HOLDING THAT THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE VERDICT.'

THE NORTH DAKOTA SUPREME COURT HAS SO HELD IN STATE v. MOE, 1967, 151 N.W. 2D 310."

THE SECTION DEFINING THE EMBEZZLEMENT CHARGED HERE IS COVERED BY SDCL 22-38-3 AND WHETHER OR NOT THE ACTS OF THE DEFENDANT WERE SUFFICIENT TO COME WITHIN THE PURVIEW OF THAT PARTICULAR SECTION IS LARGELY A FACT QUESTION. FACT ISSUES ARE PECULIARLY WITHIN THE PROVINCE OF THE JURY. HERE THERE WERE TWO DIFFERENT VERSIONS OF THOSE ACTS. THE STATE GAVE ITS VERSION AND THE DEFENDANT GAVE HIS. IT APPEARS THE JURY ACCEPTED THAT GIVEN BY THE STATE AND REJECTED THAT BY THE DEFENDANT. THIS COURT IN STATE v. OLSO, 1968, 83 S.D. 493, 161 N.W.2D 858, HAS HELD:

> "THE FACTS WERE FOR THE JURY AND THIS COURT WILL NOT DISBURB THE VERDICT UNLESS THE EVIDENCE AS A MATTER OF LAW IS INSUFFICIENT TO JUSTIFY THE JURY FINDING DEFENDANT GUILTY."

THE CREDIBILITY OF WITNESES AND WEIGH- THE EVIDENCE IS FOR THE JURY. STATE v. BURTTS, 81 S.D. 150, 132 N.W.2D 209; STATE

v. Buffalo Chief, 83 S.D. 131, 1155 N.W.2d 914. In the recent case of State v. Hanson, 1974, S.D., 215 N.W.2d 130, quoting from an earlier case, we said:

> "'When the state has introduced evidence upon which, if believed by a jury, they may reasonably find the defendant guilty of the crime charged, the state has made out a prima facie case, and the jury, not the judge, ought to pass on it.'

The jury heard the evidence as offered by the state and the evidence offered in support of appellant's defense. As indicated above, the trial court permitted wide leeway in letting appellant develop his defense. His defense was also fully covered by the court's instructions. Thus the question of appellant's guilt or innocence was fairly submitted to the jury. It is well established by decisions of this Court that "The jury are the exclusive judges of the credibility of the witnesses and the weight of the evidence.'"

It would extend this opinion beyond

REASONABLE LENGTH TO REVIEW THE EVIDENCE FULLY HEREIN, SO WE WILL BRIEFLY SUMMARIZE.

THE PARTIES IN A DIVORCE ACTION, MR. AND MRS. ZICK, CALLED ON MR. MYERS TO GET THE DIVORCE. THE HUSBAND WAS TO PAY FOR THE LEGAL SERVICES, AND DEFENDANT MYERS WAS TO GET THE DIVORCE FOR MRS. ZICK. CERTAIN UNITED STATES SAVINGS BONDS, PROPERTY OF MRS. ZICK, REGISTERED IN THE NAMES OF HERMAN WEISMANTEL, P.O.D. MRS. JEANETTE ZICK, WERE DISCUSSED. THE DEFENDANT TOLD MRS. ZICK THAT THE VALUE OF THE BONDS WOULD BRING A BETTER RATE OF INTEREST IF THEY WERE CASHED AND INVESTED IN SOMETHING ELSE. MRS. ZICK WAS REQUESTED BY DEFENDANT TO ENDORSE THE BONDS, WHICH SHE DID. THE DEFENDANT THEN TOOK THE BONDS SO ENDORSED TO A LOCAL BANK FOR REDEMPTION, AND THE BANK SET THEM IN TO THE FEDERAL RESERVE BANK. THE DEFENDANT ON THE STRENGTH OF THE BONDS AND HIS PERSONAL NOTE BORROWED FROM THE BANK THE AMOUNT OF THE REDEMPTION VALUE IN THE SUM OF $4033.60 WHICH

HE DEPOSITED IN HIS OWN PERSONAL ACCOUNT THE DEFENDANT GAVE HIS PERSONAL NOTE TO THE BANK. HE TOLD THE BANKER THAT HE NEEDED THE MONEY THAT DAY SO THAT HE COULD GIVE THE MONEY TO MRS. ZICK BECAUSE OF HER FINANCIAL CONDITION. DEFENDANT ASKED THE BANKER IF HE COULD BORROW THE MONEY, THEN WHEN THE PROCEEDS WERE RECEIVED, TO APPLY "THOSE AGAINST THE NOTE TO PAY IT OFF." THIS IS WHAT WAS DONE, AND WHEN THE PROCEEDS OF THE REDEEMED BONDS WERE RETURNED TO THE BANK, THE NOTE SIGNED BY DEFENDANT WAS CANCELED AS PAID IN FULL. THE BANK ENDORSED THE CHECK FROM THE TREASURER OF THE UNITED STATES WITH A CREDIT AND GUARANTEED THE ENDORSEMENT. IT WAS NOT ENDORSED BY MRS. ZICK.

THE DEFENSE IS THAT WHEN MRS. ZICK CAME TO DEFENDANT HE WENT OVER HER PAPERS AMONG WHICH WERE THE BONDS. HE DISCUSSED WITH HER THE NEEDS OF THE FAMILY AND SUGGESTED CASHING THE BONDS AND USING THE PRO-

CEEDS IN SOME INVESTMENT YIELDING A HIGH RATE OF INTEREST. DEFENDANT STATED THAT THERE WAS AN INDIVIDUAL NAMED ROBERTS WHO OWNED A PIECE OF PROPERTY WHICH HE HAD SOLD BY CONTRACT FOR DEED, AND THAT MR. ROBERTS ALSO OWED DEFENDANT MONEY. THE CONTRACT FOR DEED WAS PAYING AN 8% RETURN ON THE BALANCE DUE ALONG WITH MONTHLY PAYMENTS. DEFENDANT CLAIMS HE INFORMED MRS. ZICK THAT THE CONTRACT WAS A SOUND INVESTMENT, AND THAT IT WOULD PROVIDE MONTHLY PAYMENTS FOR HER TO APPLY AGAINST LIVING EXPENSES AND IT WOULD INCREASE HER INCOME UP TO A LEVEL WITH HER OTHER IN- INCOME, WHICH WOULD SUPPORT HER AND HER CHILDREN. DEFENDANT TESTIFIED THAT MRS. ZICK AND DEFENDANT DISCUSSED THE MATTER OF THE DIFFERENCE IN THE INTEREST RATES, AND THAT SHE WOULD BE RECEIVING A TWO AND HALF TO THREE PERCENT INCREASE. MRS. ZICK AGREED TO TAKE IT. TO ACCOMLISH THIS END DEFENDANT DRAFTED A DEED TO THE PROPERTY

FROM ROBERTS TO MRS. ZICK WHICH WAS EXECUTED BY ROBERTS. DEFENDANT NEVER GAVE HER THE DEED FROM ROBERTS, BUT HE CLAIMED HE HAD INFORMED MRS. ZICK OF ITS EXISTENCE.

IT WAS MRS. ZICK'S TESTIMONY THAT SHE DISCHARGED DEFENDANT AS HER ATTORNEY THE END OF FEBRUARY OR FIRST PART OF MARCH 1970, AND IT WAS NOT UNTIL SOME TIME IN APRIL 1970, AND AFTER SHE HAD DISCHARGED HIM, WHEN DEFENDANT FIRST TOLD HER THE BONDS HAD BEEN CASHED "BUT HE DIDN'T HAVE TIME TO GO INTO WHAT THEY HD BEEN INVESTED IN." THIS WAS THE FIRST TIME SHE HAD BEEN INFORMED THEY HAD BEEN CASHED. IT WAS NOT UNTIL AUGUST 1970 THAT DEFENDANT PAID THE PROCEEDS OF THE BONDS OVER TO HER NEW LAWYER, LESS $617.50 FOR ATTORNEY FEES FOR SERVICES RENDERED BY HIM IN THE CASE OF ZICK V. ZICK. THE STATEMENT DATES FROM DECEMBER 30, 1969 TO MARCH 22, 1970. THE REMITTANCE FROM DEFENDANT TO MRS. ZICK'S

NEW ATTORNEY IS IN THE AMOUNT OF $3,418. 10. MRS. ZICK RECEIVED HER DIVORCE THROUGH THE SERVICES OF HER NEW ATTORNEY. WE HAVE GIVEN BUT THE SKELITAL OUTLINE OF THE CLAIMS MADE IN THE CASE. THE STORIES TOLD IN COURT BY MRS. ZICK AND THE DEFENDANT WERE CONFLICTING, AND ALSO THE BANKER'S TESTIMONY WAS DAMAGING TO THE DEFENDANT. IT WAS FOR THE JURY TO SEARCH OUT THE TRUTH.

THE APPELLANT UNDER QUESTION I OF HIS APPEAL HAS LISTED AS FOUNDATION FOR SUCH QUESTION HIS ASSIGNMENTS I AND IV. ASSIGNMENT I IS AS FOLLOWS:

> "THE COURT ERRED IN OVERRULING THE OBJECTION OF THE DEFENDANT TO THE INTRODUCTION OF ANY EVIDENCE UNDER THE INDICTMENT FOR THE REASON THAT THE INDICTMENT FAILED TO STATE A PULIC OFFENSE OR CHARGE A VIOLATION OF ANY LAW OF THE STATE OF SOUTH DAKOTA."

THE LAW WHICH DEFENDANT IS CHARGED WITH VIOLATING IS SDCL 22-38-3, SUPRA, AND READS AS FOLLOWS:

> "IF ANY PERSON BEING A TRUSTEE, BANKER,MERCHANT,BROKER,ATTORNEY, AGENT, ASSIGNEE IN TRUST,EXECUTOR, BEING OTHERWISE ENTRUSTED WITH OR HAVING IN HIS CONTROL PROPERTY FOR THE USE OF ANY OTHER PERSON OR PERSONS OR FOR ANY PUBLIC OR BENEVOLENT PURPOSE, FRAUDULENTLY APPROPRIATES IT TO ANY USE OR PURPOSE NOT IN THE DUE AND LAWFUL EXECUTION OF HIS TRUST, OR SECRETES IT WITH THE FRAUDULENT INTENT TO APPROPRIATE IT TO SUCH USE OR PURPOSE, HE IS GUILTY OF EMBEZZLEMENT."

AT THE BEGINNING OF THE CASE DEFENDANT'S ATTORNEY MADE THE FOLLOWING OBJECTION:

> "BEFORE ANY TESTIMONY IS TAKEN THE DEFENDANT OBJECTS TO THE INTRODUCTION OF ANY EVIDENCE ON THE PART OF THE STATE FOR THE REASON AND ON THE GROUNDS THAT THE INDICTMENT FAILS TO STATE A PUBLIC OFFENSE OR CHARGE OF VIOLATION OF ANY LAWS OF THE STATE OF SOUTH DAKOTA, AND IN FACT, I POINT OUT TO THE COURT THAT THE INDICTMENT FAILS TO ALLEGE THE OWNERSHIP OF THE MONEY AND FAILS TO ALLEGE THE NAME OF THE PERSON AGAINST WHOM THE OFFENSE WAS COMMITTED; THAT BEING WHOLLY AS REQUIRED BY THE STATUTE. AND FOR THE RECORD, THAT IS SDCL 23-32-5."

SDCL 23-32-5 READS AS FOLLOWS:

> "THE INDICTMENT OR INFORMATION MUST BE DIRECT AND CERTAIN AS IT REGARDS:
>
> (1) THE PARTY CHARGED;
>
> (3) THE NAME OF THE THING OR PERSON OR AGAINST WHOM THE OFFENSE WAS COMMITTED.

THE COURT OVERRULED THIS OBJECTION, AND WE BELIEVE CORRECTLY. THE INDICTMENT STATED THAT THE PERSON WHO ENTRUSTED THE MONEY TO THE DEFENANT WAS JEANETTE ZICK, AND IT SETS FORTH THE FACTS DONE BY DEFENDANT UPON WHICH HE WAS BEING CHARGED.

IN STATE V. BLUE FOX BAR, INC., 1964, 80 S.D. 565, 128 N.W.2D 561, 563, WE STATED THE RULE TO BE:

> "THE TEST OF THRE SUFFICIENCY OF AN INFORMATION UNDER THESE PROVISIONS IS WHETHER IT APPRISES A DEFENDANT WITH REASONABLE CERTAINTY OF THE NATURE OF THE ACCUSATION AGAINST HIM SO THAT HE MAY PREPARE HIS DEFENSE AND PLEAD THE JUDGMENT AS A BAR TO ANY SUBSEQUENT PROSECUTION FOR THE SAME OFFENSE. STATE V. SINNOTT, 72 S.D. 100, 30 N.W. 2D 455; STATE V. WOOD, 77 S.D. 120, 86 N.W.2D 530; STATE V. BELT, 79 S.D. 3245, 111 N.W.2D 588."

SEE ALSO STATE V. HENRY, 210 N.W.2D 169, SUPRA, AT PAGES 173, 174.

ASSIGNMENT IV UNDER QUESTION I READS AS FOLLOWS:

> "THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION, FOR DIRECTED VERDICT OF ACQUITTAL FOR ALL THE REASONS STATED IN THE MOTION FOR DIRECTED OF ACQUITTAL MADE AT THE CLOSE OF ALL THE EVIDENCE."

THE MOTION MADE AT THE CLOSE OF ALL THE TESTIMONY IS A LONG ONE WHICH WE WILL NOT SET FORTH AT LENGTH. WE REITERATE THIS, HOWEVER, THE EVIDENCE WAS CONFLICTING. IF MRS. ZICK WAS CORRECT IN HER TESIMONY, IF THE BANKER WAS CORRECT IN HIS, THEN THE DEFENDANT WAS WRONG IN CERTAIN CRUCIAL ASPECTS OF HIS. THERE WAS AT LEAST A PRIMA FACIE CASE MADE BY THE STATE "AND THE JURY, NOT THE JUDGE, OUGHT TO PASS ON IT."

THE WORD "INTENT" USED IN QUESTION I BY APPELLANT IS ALSO CLOSELY CONNECTED WITH QUESTION II HERETOFORE SET FORTH AND HEREINAFTER DISCUSSED. THE COURT USED THE WORD "INTENT" IN A NUMBER OF HIS INSTRUCT-

IONS TO THE JURY AND THEN IN INSTRUCTION 9 GAVE GUIDANCE TO THE JURY HOW "INTENT" IS FOUND IN THE CONTEXT OF THE CASE. NO OBJECTIN WAS MADE, AND WE BELIEVE THE IN-INSTRUCTION EXPRESSED THE CORRECT LAW.

POINT II OR QUESTION II BY APPELLANT BRINGS UP A RULING BY THE TRIAL COURT REFUSING TO ALOW THE DEFENDANT TO TESTIFY WHY HE IN GOOD FAITH BELIEVED HE HAD THE RIGHT TO CASH THE BONDS AND PLACE THE PROCEEDS IN HIS BANK ACCOUNT. THIS DEFENSE IS SPECIFICALLY AUTHORIZED BY SDCL 22-38-10 WHICH PROVIDES AS FOLLOWS:

> "UPON ANY TRIAL FOR EMBEZZLEMENT IT IS A SUFFICIENT DEFENSE THAT THE PROPERTY WAS APPROPRIATED OPENLY AND AVOWEDLY AND UNDER A CLAIM OF TITLE PREFERRED IN GOOD FAITH EVEN THOUGH SUCH CLAIM IS UNTENABLE TO OFFSET OR PAY A A DEMAND AGAINST HIM."

THIS ASSIGNMENT IS PREDICATED UPON THE OFFER OF PROOF WHICH WAS MADE BY THE DEFENDANT AT THE TRIAL. IT IS PREDICATED ON THE FOLLOWING QUESTIONS AND ANSWERS:

"Q MR.MYERS, DID YOU BELIEVE,

WHEN YOU COMPLETED THIS TRANSACTION OVER AT THE BANK, AND THE BANKER PUT THE MONEY IN YOUR ACCOUNT, DID YOU BELIEVE THAT YOU HAD THE RIGHT TO DO THAT?

A. YES, I DID.

* * * * * *

WOULD YOU STATE WHY YOU BELIEVED YOU HAD THE RIGHT TO DO IT?

A. I WAS AUTHORIZED BY MRS. ZICK WHEN SHE SIGNED THE BONDS.

Q. DID YOU CONTINUE TO BELIEVE THAT YOU HAD THAT RIGHT, UP TO AND AFTER YOU COMPLETED THE DEAL?
A. CERTAINLY.

BY MR. BUTLER: NOW I WOULD JUST LIKE TO POINT OUT TO THE COURT THAT THIS OFFER OF PROOF IS BASED ON SDCL 22-38-10.

* * * * * *

BY THE COURT: WELL, IT SEEMS TO ME THAT IT IS A SELF-SERVING STATEMENT AS TO WHAT HE BELIEVED. THE TESTIMONY HERE IS THAT SHE ENDORSED THE BONDS AND HE RECEIVED THE PROCEEDS WHICH WERE PUT INTO HIS CHECKING ACCOUNT.

WELL, I AM GOING TO PERMIT THE ANSWER TO THAT FIRST QUESTION, THAT HE BELIEVED HE HAD A RIGHT TO PUT THAT IN HIS

> ACCOUNT. THAT IS AS FAR AS WE WILL GO WITH IT. THAT IS THE ONE THAT WAS STRICKEN OUT."

THE JURY WAS RETURNED AND THE COURT HAD THE REPORTER READ THE FIRST QUESTION OF THE THREE ASKED, AND THE ANSWER TO IT, TO THE JURY. THIS LIMITS THE ERROR, IF ANY, TO QUESTIONS TWO AND THREE AND THEIR ANSWERS.

THE CONTENTION OF DEFENDANT IS STATED AS FOLLOWS:

> "THE STATE OF MIND OF THE DEFENDANT WAS CLEARLY A MATERIAL ISSUE IN THIS CASE UNDER SDCL 22-38-10. DENYING HIM THE RIGHT TO EXPLAIN HIS ACTIONS WAS HIGHLY PREJUDICIAL. THE COURT SUBMITTED THE ISSUE OF THE DEFENDANT'S GOOD FAITH TO THE JURY IN THE INSTRUCTIONS, BUT YET DENIED HIM THE RIGHT TO STATE TO THE JURY WHAT HIS STATE OF MIND WAS AND HIS REASONS THEREFORE. THIS CLEARLY WAS PREJUDICIAL ERROR."

WE BELIEVE THE COURT WAS CLEARLY WRONG IN HIS DENIAL OF THE LAST TWO QUESTIONS AND THE ANSWERS. WARNER V. HOPKINS, 42 S.D. 613, 176 N.W. 746; STATE V. HOLTER, 30 S.D. 353, 138 N.W.

953; WIGMORE ON EVIDENCE, 3RD ED., §581, PP. 714 AND 715.

THE QUESTION WE HAVE HERE, HOWEVER, IS WHETHER THE ERROR OF THE COURT WAS PREJUDICIAL TO THE SUBSTANTIAL RIGHTS OF THE DEFENDANT. SDCL 23-1-2. WE HOLD IT IS NOT.

IN STATE v. REDDINGTON, 80 S.D. 390, 125 N.W.2D 58, WE HELD:

> "THERE IS NO DEFINITE RULE BY WHICH TO MEASURE PREJUDICIAL ERROR AND EACH CASE MUST BE DECIDED ON ITS OWN FACTS."

IN A DEFINITION OF PREJUDICIAL ERROR WE HAVE SAID:

> "PREJUDICIAL ERROR IS SUCH ERROR AS IN PROBABILITY MUST HAVE PRODUCED SOME EFFECT UPON THE FINAL RESULT OF THE TRIAL, NAMELY, THE VERDICT OF THE JURY." STATE v. PIRKEY, 24 S.D. 533, 124 N.W. 713.

AN EXAMINATION OF THE WHOLE TESTIMONY OF THE DEFENDANT SHOWS THAT IT IS REPLETE WITH QUESTIONS AND ANSWERS OF SIMILAR CONTENT AND IMPORTANCE TO THE DEFENDANT'S CONTENTION. ACTUALLY THERE IS NOTHING IN THE OFFER OF PROOF THAT WASN'T FULLY AND

COMPLETELY BEFORE THE JURY BY THE EVIDENCE OF THE DEFENDANT HIMSELF. WE HOLD THAT THE DENIAL OF THE TWO QUESTIONS TOGETHER WITH THEIR ANSWERS IN THE OFFER OF PROOF WAS SIMPLY NOT PREJIDICIAL UNDER THE CIRCUMSTANCES. IT ADDED NOTHING TO HIS PREVIOUS TESTIMONY AND A REVERSAL ON THIS ERROR WOULD BE TO EXALT FORM OVER SUBSTANCE. THE DEFENDANT HAD A FAIR TRIAL.

THE JUDGMENT IS AFFIRMED.

DOYLE, J., AND RENTTO, RETIRED JUDGE, CONCUR.

BIEGELMEIER, C.J., CONCURS BY OPINION.

DUNN, J., CONCURS BY OPINION.

RENTTO, RETIRED JUDGE, SITTING FOR WOLLMAN, J., DISQUALIFIED.

BIEGELMEIER, CHIEF JUSTICE (CONCURRING).

AS THE LAST PARAGRAPH OF THE OPINION STATES AND THE RECORD SHOWS, THE TWO QUESTIONS CALLED FOR EVIDENCE GIVEN BY THE WITNESS IN HIS PRIOR TESTIMONY; CONSEQUENTLY THEY WERE REPETITIOUS AND

CUMULATIVE, AND THE COURT DID NOT ERR IN SUSTAINING THE OBJECTION TO THEM.*

DUNN, JUSTICE (CONCURRING SPECIALLY).

I WOULD CONCUR IN AFFIRMING THE DECISION OF THE TRIAL COURT UNDER THE FACTS OF THIS CASE. I BELIEVE, HOWEVER, THAT A WORD OF CAUTION IS IN ORDER AS TO THE IMPLICATIONS OF THIS DECISION.

THE INTERMINGLING OF A CLIENT'S FUNDS WITH HIS OWN BY AN ATTORNEY IS A SERIOUS BREACH OF TRUST AND HAS ALWAYS BEEN FROWNED ON BY THE LEGAL FRATERNITY. I AM SURE THAT MOST ATTORNEYS HAVE TRUST ACCOUNTS FOR THEIR CLIENTS' FUNDS, BUT TO THOSE FEW WHO DON'T I WOULD STATE THAT THIS CHARGE OF EMBEZZLEMENT SHOULD BE A RED ALERT; A TRUST ACCOUNT FOR CLIENTS' FUNDS BECOMES IMPERATIVE; AND, FURTHER, PERSONAL BILLS BEST NOT BE PAID OUT OF THAT TRUST ACCOUNT. AT SOME PLACE THE COMMINGLING OF CLIENTS' FUNDS WITH ONE'S OWN BECOMES EMBEZZLEMENT. IF PERSONAL

CHECKS ARE WRITTEN BY THE ATTORNEY ON AN ACCOUNT CONTAINING CLIENTS' FUNDS. THIS IS SUFFICIENT TO SHOW APPROPRIATION UNDER THE BROAD LANGUAGE OF SDCL 22-38-3 AS INTERPRETED IN THIS DECISION. THIS LEAVES THE ISSUE OF "FRAUDULENT INTENT" WHICH GENERALLY MUST BE PROVED BY IMPLICATION FROM THE FACTS SURROUNDING THE CASE. THE CIRCUMSTANCES IN THIS CASE ARE FLAGRANT ENOUGH TO LEAVE LITTLE DOUBT THAT THIS ISSUE WAS PROPERLY SUBMITTED TO THE JURY FOR RESOLUTION. THE QUESTION LEFT UNANSWERED IS--AT WHAT STAGE DO THE CIRCUMSTANCES SURROUNDING THE COMMINGLING OF FUNDS MAKE OUT A PRIMA FACIE CASE OF EMBEZZLEMENT FOR SUBMISSION TO A JURY?

* SOME OF THE EVIDENCE OF THE HASTE AND UNORTHODOX METHOD BY WHICH MRS. ZICK LOST HER "E" BONDS SHOWS THAT SHE DID NOT SIGN THE "E" OBNDS IN THE PRESENCE OF THE ASSISTANT VICE PRESIDENT OF THE BANK OR STATE TO HIM THAT SHE DID SIGN THEM, YET HE CERTIFIED THAT SHE "SIGNED THE ABOVE REQUEST IN [HIS] PRESENCE." THE CHECK IN PAYMENT OF THESE BONDS WAS MADE PAYABLE TO MRS. JEANETTE ZICK. THE UNDISPUTED EVIDENCE ALSO SHOWS IT WAS CREDITED TO THE ACCOUNT OF MORRIS MYERS; HOWEVER, THE

ENDORSEMENT STATES THAT IT WAS CREDITED TO THE ACCOUNT OF THE "PAYEE," MRS. ZICK. THE BANKER DID THIS BECAUSE HE "TRUSTED" DEFENDANT, AND HIS REPRESENTATIONS AND URGINGS OF HASTE WERE EVIDENCE OF DEFENDANT'S INTENT TO OBTAIN THE PROCEEDS OF THE BONDS FOR HIS OWN USE.

[**NOTE:** IN EXPLANATION OF WHY THE MATTER OF THE ZICK BONDS WAS NOT PLAYED OUT ACCORDING TO THE REGULATORY SCHEME, ATTORNEY C. E. RICHARDS (OF RONAYNE & RICHARDS) WAS MRS. ZICK'S ATTORNEY AFTER PETITIONER WAS FIRED, AND HE ALSO REPRESENTED THE BANK THAT FORGED THE ZICK TREASURY CHECK. HE LATER SUED PETITIONER FOR THE INTEREST DUE ON THE PROMISSORY NOTE THAT ACCRUED BETWEEN JANUARY 8, 1970, AND JANUARY 16, 1970.]

APPENDIX B:

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN THE MATTER OF THE DISCIPLINE OF MORRIS BEECHER MYERS, A/K/A MORRIS MYERS, AS AN ATTORNEY AT LAW	ORDER REVOKING LICENSE TO PRACTICE LAW

WHEREAS DISCIPLINARY PROCEEDINGS HAVE BEEN COMMENCED BY THE ATTORNEY GENERAL OF THE STATE OF SOUTH DAKOTA AGAINST THE ABOVE NAMED ATTORNEY AND ARE NOW PENDING IN THIS COURT AND SAID MATTER HAVING BEEN REFERRED TO THE HONORABLE GEORGE W. WUEST, CIRCUIT JUDGE OF THE FOURTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH DAKOTA, AS REFEREE TO HEAR THE TESTIMONY AND TO MAKE FINDINGS OF FACT AND RECOMMENDATIONS THEREIN; AND SAID REFEREE HAVING MADE AND ENTERED FINDINGS OF FACT AND HAVING RECOMMENDED THAT SAID ATTORNEY BE EITHER SUSPENDED OR DISBARRED, AND

WHEREAS SAID ATTORNEY WAS CONVICTED OF THE CRIME OF EMBEZZLEMENT ON THE 12TH DAY OF APRIL 1973 IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT AS EVIDENCED BY THE CERTIFIED

SENTENCE OF SAID COURT DATED THE 7TH DAY OF MAY 1973, WHICH IS ON FILE IN THE OFFICE OF THE CLERK OF THIS COURT, AND

WHEREAS THE REPORT OF THE REFEREE AND THE MATTER OF THE CONVICTION OF THE CRIME OF EMBEZZLEMENT AS GROUNDS FOR DISBARMENT HAVING BEEN BROUGHT ON FOR HEARING ON MAY 17, 1973 AT 10:00 A.M. IN THE COURTROOM OF THE COURT IN PIERRE, SOUTH DAKOTA, WALTER W. ANDRE, ASSISTANT ATTORNEY GENERAL, APPEARING FOR THE STATE OF SOUTH DAKOTA AND MORRIS B. MYERS APEARING IN PERSON, AND THE COURT HAVING HEARD THE MATTER AND HAVING BEEN DULY ADVISED, ACCEPTS AND APPROVES THE FINDINGS OF FACT AND RECOMMENDATION FOR DISBARMENT MADE BY THE REFEREE, AND

WHEREAS SAID ATTORNEY HAS SUBMITTED HIS RESIGNATION IN WRITING AS AN ATTORNEY OF THE STATE OF SOUTH DAKOTA AND AS A MEMBER OF THE STATE BAR OF SOUTH DAKOTA UPON CONDITIONS WHICH THE COURT REFUSES TO ACCEPT,

NOW, THEREFORE, UPON THE FINDINGS OF FACT AND RECOMMENDATIONS FOR DISBARMENT MADE BY THE REFEREE AND BECAUSE OF THE CONVICTION OF THE CRIME OF EMBEZZLEMENT,

IT IS THEREFORE ORDERED THAT THE LICENSE OF MORRIS BEECHER MYERS TO PRACTICE LAW IN THE STATE OF SOUTH DAKOTA IS REVOKED AND SAID ATTORNEY SHALL FORTHWITH SURRENDER HIS LICENSE TO PRACTICE LAW TO THE CLERK OF THIS COURT FOR CANCELLATION.

IT IS FURTHER ORDERED THAT THE CLERK OF THIS COURT STRIKE THE NAME OF MORRIS BEECHER MYERS FROM THE ROLL OF PERSONS ADMITTED AND ENTITLED TO PRACTICE LAW IN SOUTH DAKOTA AND SAID ATTORNEY IS HEREAFTER PROHIBITED FROM PRACTICING LAW IN THIS STATE.

IT IS FURTHER ORDERED THAT SAID ATTORNEY FORTHWITH RETURN ALL FILES, PLEADINGS, RECORDS, ACCOUNTS, AND MONIES IN HIS POSSESSION AS AN ATTORNEY AT LAW TO THE PERSON OR PERSONS ENTITLED THERETO

AND SHALL IN NO MANNER HEREAFTER HOLD HIMSELF OUT TO THE PUBLIC AS A PERSON ENTITLED TO PRACTICE LAW IN THIS STATE.

DATED AT PIERRE, SOUTH DAKOTA, THIS 18TH DAY OF MAY, 1973.

BY THE COURT:
/S/FRANK BIEGELMEIER
FRANK BIEGELMEIER,
CHIEF JUSTICE

ATTEST:
/S/LYMAN A. MELBY(SEAL)
LYMAN A. MELBY, CLERK OF THE SUPREME COURT

PERSONAL SERVICE OF THE ABOVE ORDER REVOKING LICENSE TO PRACTICE LAW BY RECEIPT OF A CERTIFIED COPY THEREOF IS HEREBY ADMITTED AT PIERRE, SOUTH DAKOTA, THIS 18TH DAY OF MAY, 1973.
/S/MORRIS BEECHER MYERS
MORRIS BEECHER MYERS

SUPREME COURT
STATE OF SOUTH DAKOTA

F I L E D
MAY 18, 1973
/S/LYMAN A. MELBY
CLERK

APPENDIX C:

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

SUPREME COURT OF SOUTH DAKOTA
F I L E D
SEP 11 1989
GLORIA ENGEL, CLERK

STATE OF SOUTH DAKOTA,
PLAINTIFF AND APPELLEE,

VS.

MORRIS B. MYERS,
DEFENDANT AND APPELLANT

-- #11304

ORDER DENYING MOTION

IN THE MATTER OF THE DISCIPLINE OF MORRIS BEECHER MYERS, A/K/A MORRIS MYERS, AS AN ATTORNEY AT LAW

-- #11057

THE ABOVE NAME MORRIS MYERS HAVING SERVED AND FILED A MOTION TO VACATE THE COURT'S DECISION IN No. 11304, RECALL THE REMITTITUR IN No. 1022 WITH DIRECTION TO DISMISS THE PROSECUTION AND DISCHARGE THE DEFENDANT, AND VACATE AND WITHDRAW THE ORDER REVOKING LICENSE TO PRACTICE LAW ENTERED IN No.11057, AND THE COURT HAVING CONSIDERED THE MOTION AND BEING FULLY ADVISED IN THE PREMISES, NOW, THEREFORE, IT IS

ORDERED THAT SAID MOTION BE AND IT IS IN ALL THINGS DENIED.

DATED AT PIERRE, SOUTH DAKOTA,
THIS 11TH DAY OF SEPTEMBER, 1989.

BY THE COURT:

/s/ROBERT E. MORGAN
ACTING CHIEF JUSTICE

ATTEST:
/s/GLORIA I. ENGEL
CLERK OF THE SUPREME COURT
(SEAL)

(CHIEF JUSTICE GEORGE W. WUEST, DEEMING HIMSELF DISQUALIFIED, DID NOT PARTICIPATE.)